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A characteristic of the American legal system is the preoccupation of judges with the details of police conduct (and misconduct) in the gathering of evidence. The phenomenon is well illustrated in *Police Practices and the Law*, a collection of eight significant articles from the *Michigan Law Review*, with an introduction by Professor Francis A. Allen.[1] Confronting the reader with thoughtful essays in the fields of searches, interrogations, and lineups serves at least two useful purposes. The first is the traditional function of legal scholarship: sorting out the case law, analyzing doctrines, noticing trends, criticizing flawed reasoning, urging a preferred position, and peeking into the future. The second is holding a mirror to a host of appellate court decisions on police practices, providing an opportunity for reflection upon what may be motivating judges to issue so many of these decisions.

I

Police Practices contains three general essays and five pieces focused on specific investigative techniques. Most interesting of the first category is the persuasive case that Judge Carl McGowan makes for internal police rulemaking. Such rules, he points out, offer the prospect of defining suspects' rights and creating internal mechanisms to compel general observance of those rights, wholly apart from the sporadic, after-the-fact intervention of courts applying the exclusionary rule. The extent to which the exclusionary rule will be available to enforce internal police rules has been cast in doubt since the appearance of Judge McGowan's article. Writing in 1972, he expressed confidence that at least *federal* law enforcement agencies would be bound to observe their own rules, on pain of having evidence obtained in violation of those rules excluded. He relied on *United States ex rel. Accardi v. Shaughnessy*,[2] a decision that he acknowledged "may possibly have less significance in a state situation" (p. 48). Of course, as events turned out, *Accardi* did not carry the day even in the federal arena after the Supreme

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1. If it seems a bit incestuous for the *Michigan Law Review* to print a review of a collection of articles from the *Michigan Law Review*, published by the University of Michigan Press, I can at least enter the disclaimer of having no connection whatever with the University of Michigan or its Law School.

2. 347 U.S. 260 (1954).

Court refused to exclude evidence that an Internal Revenue Service agent had recorded in violation of I.R.S. regulations.[3] But the case for internal rule-making remains strong, perhaps even stronger or at least more realistic, now that rule violations will not automatically preclude the use of evidence thereby obtained.[4]

Dean Kenneth Pye's 1968 survey of the Warren Court's criminal procedure decisions and Professor Jerold Israel's 1977 assessment of how those decisions have fared during the Burger years offer useful perspectives for those who prefer to see only heroes and villains. After all, Israel notes, it was the Warren Court that upheld seizures of mere evidence in *Warden v. Hayden*,[5] and approved "stop and frisk" without probable cause in *Terry v. Ohio*[6] (pp. 77-78), and the Burger Court that rejected warrantless electronic surveillance of domestic subversives in *United States v. United States District Court*,[7] and required prompt review of probable cause after warrantless arrests in *Gerstein v. Pugh*[8] (p. 104). Still, the eras these essays review are obviously distinct: the substantive content of the fourth, fifth, and sixth amendments was enlarged during Warren's tenure, and the Burger Court has resisted most of the claims for further expansion. What remains to be seen is what the Burger Court will produce when it has a Burger majority.

The five articles on specific fields of police practice vary considerably in their ambition. Two are unabashed arguments for a particular position. Professor Yale Kamisar's 1966 contribution makes a strong and enduring case for the *Miranda* rule, marshalling arguments more effectively than did the *Miranda* majority opinion. This will remain a useful piece for critics of *Miranda* to ponder.

Professor Herman Schwartz's 1969 article assails the court-ordered wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[9] He finds them unconstitutional and unwise. The arguments are not novel: surveillance will inevitably be broadly intrusive, the need is less than has been advertised and insufficient to justify the loss of privacy, and judges are unequal to the task of enforcing the probable cause requirement. The use of facts in support of these propositions is spotty. For example, I do not find persuasive the overheard[10] remark of an unidentified New York judge that "I sign every wiretap order that's put in front of me" (p. 251 n.147). As a District Judge, I did too, and every one was sup-

3. *See* United States v. Caceres, 440 U.S. 741 (1979).

4. *Caceres* does not totally dispel *Accardi*, since *Caceres* is careful to reject the exclusionary rule as a sanction only for violation of rules not "required by the Constitution or by statute." 440 U.S. at 749. Of course, we are soon to learn whether the exclusionary rule will undergo more substantial revision. *See* Illinois v. Gates, 51 U.S.L.W. 3415 (U.S. Nov. 29, 1982) (No. 81-430) (order restoring case to calendar for reargument and requesting parties to address question whether exclusionary rule should be modified).

5. 387 U.S. 294 (1967).

6. 392 U.S. 1 (1968).

7. 407 U.S. 297 (1972).

8. 420 U.S. 103 (1975).

9. 18 U.S.C. §§ 2510-2520 (1976).

10. The author assures us there was no invasion of the judge's privacy: the remark was overheard "in an unguarded moment at a small but public bar association meeting . . . ." P. 251 n.147. Surreptitiousness is apparently in the ear of the listener.

ported by an extraordinarily detailed affidavit. Before dismissing the state court judge's capacity for probable cause assessment, I would need to see the affidavits in support of the orders he signed.

Professor Welsh White's 1980 contribution undertakes a narrowly focused but extremely useful analysis of two key confession decisions, *Rhode Island v. Innis*[11] and *United States v. Henry*.[12] *Innis* instructs that "interrogation" within the meaning of *Miranda* occurs when the police use words or actions that they "should know are reasonably likely to elicit an incriminating response from the suspect."[13] This should mean, suggests Professor White, that interrogation occurs "if an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response . . . ." (p. 350). *Henry* teaches that "deliberate elicitation," within the meaning of *Massiah v. United States*,[14] occurs, with respect to a person in custody, when the police "intentionally creat[e] a situation likely to induce . . . incriminating statements . . . ."[15] This test, implementing the sixth amendment, rather than the fifth, should be viewed, Professor White maintains, as a lesser standard than the "designed to elicit" standard with which he refines *Innis*. He suggests that the *Henry* test will be met "when the government's deceptive conduct increases the defendant's predisposition toward making an incriminating response" (p. 358). One need not embrace Professor White's precise verbal formulations to derive enhanced understanding from his article.

What will keep this volume in the readily accessible portion of my library are the broadly analytical contributions of Professors Wayne LaFave and Joseph Grano. LaFave's 1968 article is, quite simply, an indispensable analysis of the issues courts have encountered and will continue to confront in "stop and frisk" cases. Professor Grano's 1974 article is nearly as useful for those considering the lawfulness of identification testimony, especially that obtained at line-ups; moreover, it is the only article in the book that explicitly confronts the risk of convicting the innocent. Both articles are outstanding examples of legal scholarship and alone justify this hard-cover compilation of essays on police practices.

II

Stepping back from the incisive analysis all eight essays bring to bear upon two decades of criminal procedure decisions, this reader is prompted to wonder why appellate courts are deciding so many of these cases. No doubt part of the answer derives from the enactment of the Criminal Justice Act of 1964[16] and the expansion of public defender services in most of the states in the aftermath of *Gideon v. Wainwright*.[17] But the increased availa-

11. 446 U.S. 291 (1980).
12. 447 U.S. 264 (1980).
13. 446 U.S. at 301 (footnotes omitted).
14. 377 U.S. 201 (1964).
15. 447 U.S. at 274.
16. 18 U.S.C. § 3006A (1976).
17. 372 U.S. 335 (1963).

bility of counsel ensures only that more points will be identified and preserved at trial and pursued on appeal; it does not explain why the appellate courts have responded to the flood of new claims with a profusion of decisions that invite even more claims.

Appellate courts facing an increased volume of litigation are not altogether powerless to stem the tide. *Stone v. Powell*[18] is a dramatic example of the Supreme Court's electing to keep out of the federal courts a category of lawsuits, numbering in the thousands, by simply announcing that search and seizure issues in state court convictions may not be pursued on collateral attack in federal district courts, except in the most limited situations. That approach, however, is the oddity; the norm has been to open the federal courts to more claims by a variety of techniques. Most direct is a decision upholding a new claim.[19] More indirect, but equally productive, is the denial of a claim accompanied by an exposition of detailed standards that were not quite met in the pending case.[20] Rejections of claims in that fashion are an invitation to litigants to keep trying. Indeed, whenever the courts endeavor to fashion detailed tests for determining whether general standards of the Constitution have been met, they can be sure to be besieged with appeals challenging the application of the new tests.[21]

That courts have invited the increase in litigation over police practices cannot be doubted. The question remains: "Why?" Some intriguing answers are offered in Dean Pye's essay, which presents an overview of the criminal procedure decisions of the Warren Court. Noting the Supreme Court's abdication from the field of economic regulation by the eve of World War II, Pye starts his response with a remarkable and unstated premise, barely discernible in this breathtaking observation: "The vacuum created by abdication of a function which had occupied much of the Court's time for several decades called for a new sense of direction . . . ." (p. 56). The judicial process, we are to understand, must of necessity keep busy pursuing new directions; any lull in its activity is as abhorrent to its essential function as a vacuum is to nature. I do not accept this view of a judicial system legitimately searching for things to do. At the same time, I do not doubt that some judges proceed from Pye's premise. There is a natural tendency for people in positions of authority to wish to leave their mark. That inclination is not likely to pass judges by, especially those in appellate courts whose prose achieves the permanence of print without regard to quality or significance.

In any event, if the Court of the 1940's was searching for a new direction, what led it, by the time of the 1960's, into the field of criminal justice? Pye suggests the answer is the modern struggle for civil rights. The Court,

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18. 428 U.S. 465 (1976).

19. *See, e.g.,* Stovall v. Denno, 338 U.S. 293 (1967) (creating a due process ground for excluding unnecessarily suggestive identification testimony).

20. *See, e.g.,* Neil v. Biggers, 409 U.S. 188 (1972) (reversing a grant of federal habeas corpus with an elaborate five-criteria test for assessing the reliability of identification evidence).

21. *See, e.g.,* Aguilar v. Texas, 378 U.S. 108 (1964) (refining the fourth amendment standard of reasonableness with a two-pronged test for informant information that assesses the credibility of the informant and the reliability of his information).

having joined the battle to eradicate racial inequality, was obliged to scrutinize the administration of criminal justice and ensure that "the poor Negro . . . be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime" (p. 56). The rulings may have talked of self-incrimination, unreasonable searches, right to counsel, and procedural due process, but their underlying doctrine was equal protection. A further argument offers an interesting riposte to the concern of Justice Frankfurter that judicial activism will spend the Court's precious stock of public confidence and undermine its respect. On the contrary, suggests Dean Pye, in an era of broadly based public agitation for vindication of rights never fully assured, judicial activism will ensure that courts are "responsive to changing social values" and thereby "persuade dissidents to stay within the system and out of the streets" (p. 57).

I find the argument unpersuasive. No doubt the rising public pressure to root out the vestiges of enforced racial separation has had some influence on the Court's discrimination rulings, whether the precise issue concerns state action[22] or the meaning of the Reconstruction statutes.[23] But if the Court were gauging public sentiment in the field of criminal justice, it would have required an extremely sensitive instrument to isolate the pressure for protecting the rights of minority defendants from the more pervasive pressure to strengthen (or at least not weaken) the hand of law enforcement. And if the two forces could have been accurately assessed, can we be sure the clamor for equality would have prevailed?

I suspect a part of the answer lies elsewhere, though it too relates to the social environment. Many of those who became judges in the 1960's and thereafter, including some of those who arrived at the Supreme Court a bit earlier, came of age in an era of eye-opening disclosures about the reality of police practices. The Wickersham Report of the 1930's[24] was but a straw in the wind compared to the post-World War II accounts of the dark side of policing that appeared throughout scholarly journals and the public press. The civil rights movement may have influenced judicial concern with police practices not so much by championing equality as by bringing into America's living rooms the televised outrages of police misconduct. These and other events raised the consciousness of judges and affected their perception of what they saw in trial courtrooms. The credibility of police officers became an issue. No doubt the police still won the vast majority of swearing contests, especially those that pitted them against easily discreditable felons. But sometimes the police officer was not believed.

More significantly, many of the judges, sensitized by what they had learned in the trial courts and from general information, moved on to become appellate judges, and they brought to their more significant law-making roles a skepticism about the full range of police investigational activities — about the voluntariness of the confession, the truth of the allegation supporting probable cause to search, and the reliability of the eyewitness identification. And for some the skepticism nurtured an anxiety born of the

22. *See, e.g.,* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

23. *See, e.g.,* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

24. National Comm. on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (G. Wickersham, Chairman 1931).

judges' own sense of responsibility for their role in a system that adjudicates guilt with the inevitable risk of factual error and sentences those convicted to the terrors of even our most modern prisons. Those who impose sentences and affirm convictions have become rigorous in their scrutiny of the events that brought the defendant to court, at least the immediate events whereby his case was investigated and his guilt proven.

My point is a modest one. I hardly mean to suggest that judges are grasping at any excuse to forestall or undo convictions. The evidence of the conviction and affirmance rates is overwhelmingly to the contrary. But the increased visibility of police practices has had an impact. Whether individual appellate decisions read the guarantees of the criminal rights amendments a shade more broadly or a shade more narrowly, the heightened scrutiny of police practices can be expected to remain a salient aspect of the American judiciary.